

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

TRUE HEALTH CHIROPRACTIC INC, et
al.,

Plaintiffs,

v.

MCKESSON CORPORATION, et al.,

Defendants.

Case No. [13-cv-02219-HSG](#)

**ORDER DENYING MOTION FOR
SUMMARY JUDGMENT AND
GRANTING RENEWED MOTION FOR
CLASS CERTIFICATION**

Re: Dkt. Nos. 292, 325

Pending before the Court are Plaintiffs' renewed motion for class certification and Defendants McKesson Corporation and McKesson Technologies, Inc. (collectively, "McKesson")'s motion for summary judgment, briefing for which is complete. *See* Dkt. Nos. 292 ("Class Mot."), 302 ("Class Opp."), 308 ("Class Reply"), 325 ("MSJ Mot."), 326 ("MSJ Opp."), 327 ("MSJ Reply"). After carefully considering the parties' arguments, the Court **DENIES** Defendants' motion for summary judgment and **GRANTS** Plaintiffs' renewed motion for class certification.

I. BACKGROUND

Plaintiff True Health Chiropractic, Inc. filed this putative class action on May 15, 2013, alleging that Defendant McKesson Corporation sent "unsolicited advertisements" by facsimile ("fax") in violation of the Telephone Consumer Protection Act ("TCPA"). *See* Dkt. No. 1. Plaintiff filed a First Amended Complaint on June 20, 2013, Dkt. No. 7, and a Second Amended Complaint ("SAC") on July 18, 2014, Dkt. No. 90, which added McLaughlin Chiropractic Associates, Inc. ("McLaughlin") as a Plaintiff and McKesson Technologies, Inc. as a Defendant. The operative complaint similarly alleges that Defendants violated the TCPA by sending "unsolicited advertisements" by fax. SAC ¶¶ 1–2. Plaintiffs contend that they neither invited nor

1 gave permission to Defendants to send the faxes, SAC ¶¶ 14–18, but that even assuming the faxes
2 were sent pursuant to a recipient’s express permission or an “established business relationship,”
3 the required “opt-out notice” was absent, *id.* ¶¶ 33–34.

4 During heavily contested discovery, Defendants were ordered to identify “each type of act
5 that Defendants believe demonstrates a recipient’s express permission to receive faxes (e.g.
6 completing a software registration), (2) explain[] how that act qualifies as express permission, and
7 (3) identif[y] each recipient allegedly giving that type of permission by name and contact
8 information (including, at a minimum, fax and phone number).” Dkt. No. 178 at 12. In response,
9 Defendants identified three groups of consent defenses that it argued relieved it of TCPA liability
10 and produced three exhibits—Exhibits A, B, and C—corresponding to the consent-defense groups.
11 *See* Dkt. No. 305-1 Ex. A, at 1–2. Fax recipients identified in Exhibit A purportedly gave consent
12 by (1) providing fax numbers when registering a product purchased from a subdivision of
13 McKesson; and (2) entering into software-licensing agreements, or End User License Agreements
14 (“EULA”). *Id.* Fax recipients identified in Exhibit B purportedly gave consent by (1) checking a
15 box during their software registration “that indicated express permission to be sent faxes as a
16 preferred method of communication to receive promotional information;” (2) completing a written
17 consent form “whereby they further provided their express permission to receive faxes;” or (3)
18 confirming on phone calls “that they would like to continue to receive faxes and/or would like to
19 change their communication method preferences.” *Id.* at 2. Fax recipients identified in Exhibit C
20 purportedly gave Defendants consent through individual communications and personal
21 relationships. *Id.*

22 Plaintiffs later moved to certify a single class of all putative class members. Dkt. No. 209.
23 The Court denied certification on the basis that Plaintiffs failed to satisfy Rule 23(b)(3)’s
24 predominance requirement. Dkt. No. 260. Because the Court denied certification for failure to
25 satisfy predominance, its order did not address other requirements for class certification.

26 On appeal, the Ninth Circuit affirmed in part, reversed in part, and remanded. *See True*
27 *Health Chiropractic, Inc. v. McKesson Corp.*, 896 F.3d 923 (9th Cir. 2018) (“*True Health*”). The
28 Ninth Circuit ruled that this Court should have considered the certification of subclasses tracking

Defendants’ consent-defense groups identified in Exhibits A, B, and C. *Id.* at 930–31. The Ninth Circuit then (1) held that putative class members only in Exhibit A satisfy Rule 23(b)(3)’s predominance requirement; (2) held that putative class members in Exhibit C do not satisfy Rule 23(b)(3)’s predominance requirement; and (3) remanded to this Court to determine whether putative class members in Exhibit B satisfy Rule 23(b)(3)’s predominance requirement. *Id.* at 933. As to Exhibit B alone, the Ninth Circuit added:

Given the somewhat unclear state of the record, and given that the district court has not had an opportunity to address class certification in light of our intervening decision in *Van Patten*, we view these and other issues related to Exhibit B as best addressed in the first instance by the district court on remand.

Id. (emphasis added); *see also Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037 (9th Cir. 2017). The Ninth Circuit left it to this Court, “in its discretion, to allow supplementation of the record in light of *Van Patten* and [its] opinion.” *Id.*

Following remand, the Court reopened fact discovery for the limited purpose of supplementing the record in light of *Van Patten*, and only as to putative class members identified in Exhibit B. *See* Dkt. No. 285; *see also* Dkt. No. 309 (rejecting Defendants’ attempt to reopen fact discovery wholesale). After supplemental discovery, Plaintiffs submitted a renewed motion for class certification. *See* Dkt. No. 292. Plaintiffs no longer seek certification of putative class members in Exhibit B; rather, Plaintiffs seek certification limited to the Exhibit A-only Class. *Id.* at 2. And only Plaintiff McLaughlin now seeks appointment as a class representative. *Id.* at 3.

At the hearing on the renewed motion for class certification, the Court advised the parties that it was inclined to permit narrow summary judgment briefing before ruling on that motion. *See* Dkt. No. 315. Specifically, the Court expressed interest in resolving whether the provision of fax numbers through the Medisoft product registration and EULA—in other words, Exhibit A consent defenses—constituted prior express invitation or permission to receive the disputed faxes, which is a matter of law that all parties agreed would resolve the case as to the named Plaintiff’s claim. *Id.* at 7 (“**The Court:** If providing the number via the EULA or the product registration is consent, the case is over because the individual plaintiff doesn’t have a claim. [**Plaintiffs’ Counsel**]: I would agree with that part.”); *see also id.* at 12 (“There is also no issue, I think, that

that’s subject to an up or down decision by me as to whether, as a matter of law, that’s consent.”); *True Health*, 896 F.3d at 932 (“Consent, or lack thereof, is ascertainable by simply examining the product registrations and the EULAs.”)

The Court thereafter permitted summary judgment briefing on the limited issue of “whether voluntarily providing a fax number on product registration and/or agreeing to the [EULA] constitutes express permission.” Dkt. No. 322.

II. MOTION FOR SUMMARY JUDGMENT

The Court turns first to Defendants’ motion for summary judgment, which all parties agree would resolve the case and moot any need to consider Plaintiffs’ renewed motion for class certification. *See* Dkt. No. 315 at 7.

A. Summary Judgment Legal Standard

A motion for summary judgment should be granted where there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). The purpose of summary judgment “is to isolate and dispose of factually unsupported claims or defenses.” *Celotex v. Catrett*, 477 U.S. 317, 323–24 (1986). The moving party has the initial burden of informing the Court of the basis for the motion and identifying those portions of the pleadings, depositions, answers to interrogatories, admissions, or affidavits which demonstrate the absence of a triable issue of material fact. *Id.* at 323.

If the moving party meets its initial burden, the burden shifts to the non-moving party to present facts showing a genuine issue of material fact for trial. Fed. R. Civ. P. 56; *Celotex*, 477 U.S. at 324. The Court must view the evidence in the light most favorable to the nonmovant, drawing all reasonable inferences in its favor. *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626, 630–31 (9th Cir. 1987). Summary judgment is not appropriate if the nonmoving party presents evidence from which a reasonable jury could resolve the disputed issue of material fact in the nonmovant’s favor. *Anderson*, 477 U.S. at 248. Nonetheless, “[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial.” *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587

(1986) (internal quotation marks omitted).

B. Discussion

As an initial matter, Defendants’ motion relies on extensive material beyond the scope of the summary judgment briefing authorized by the Court. The Court only permitted summary judgment briefing concerning “whether voluntarily providing a fax number on product registration and/or agreeing to the [EULA] constitutes express permission.” Dkt. No. 322. Defendants’ motion, however, relies on additional evidence to argue that Plaintiffs consented to receiving faxes in other ways. *See, e.g.*, MSJ Mot. at 8 (arguing McLaughlin consented by providing its fax number when it “acknowledged McKesson’s system requirements for Medisoft,” and that “True Health provided its fax number again when it requested an administrative password for access to Medisoft”).

In keeping with the scope of briefing it actually approved, the Court here only considers: (1) the provision of fax numbers on the Medisoft product registration form, and (2) users’ agreement to the EULA’s terms.

i. TCPA

The TCPA’s express purpose is to protect the privacy “right to seclusion,” meaning the right not to be bothered, or to be left alone. *Yahoo! Inc. v. Nat’l Union Fire Ins. Co. of Pittsburgh*, 913 F.3d 923, 925 (9th Cir. 2019); *see also* 47 U.S.C. § 227(b)(2)(C) (referring to “the privacy rights [the TCPA] is intended to protect”). In its current form and as construed by courts, the TCPA protects the public from various forms of unwanted communications, including voice calls, text messages, and even the anachronistic fax. 47 U.S.C. § 227(b)(1)(A) (making certain “call[s]” unlawful); *Van Patten*, 847 F.3d at 1042–43 (explaining that the TCPA’s reference to “calls” encompasses text messages) (quoting *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 18 FCC Rcd. 14014, 14115 (July 3, 2003)¹; 47 U.S.C. § 227(b)(1)(C) (making certain “facsimile[s]” unlawful).

The TCPA’s protections against unwanted calls and faxes are not coextensive. The

¹ Because the TCPA’s protections against unwanted voice calls and text messages derive from the same provision concerning “calls,” the Court includes both protections when referring to “call(s).”

1 TCPA’s fax provisions, for example, prohibit sending certain “unsolicited advertisement[s],”
 2 which the statute defines as “any material advertising the commercial availability or quality of any
 3 property, goods, or services which is transmitted to any person without that person’s prior express
 4 invitation or permission, in writing or otherwise.” 47 U.S.C. § 227(a)(5), (b)(1)(C). This is
 5 different from the call provisions, which prohibit “any call” (if other conditions are met). *Id.*
 6 § 227(b)(1)(A).

7 Because the TCPA only protects consumers from unwanted communications, the statute
 8 creates a complete affirmative defense for TCPA defendants where a recipient provided “prior
 9 express consent” for calls, or “prior express invitation or permission” for faxed advertisements.
 10 *Id.* § 227(b)(1)(A) (referring to “the prior express consent of the called party”); *id.* § 227(a)(5)
 11 (referring to a fax recipient’s provision of “prior express invitation or permission”); *Van Patten*,
 12 947 F.3d at 1044 (“Express consent is not an element of a plaintiff’s prima facie case but is an
 13 affirmative defense for which the defendant bears the burden of proof.”); *True Health*, 896 F.3d at
 14 931 (holding in the fax context “that ‘prior express invitation or permission’ is an affirmative
 15 defense”). And the Ninth Circuit explained in *Van Patten* that the voluntary provision of one’s
 16 number constitutes consent to communications related to the context in which one provides the
 17 number. 847 F.3d at 1044–45. There, the plaintiff provided his cell phone number on a gym
 18 membership application, which the Court found constituted express consent “to being contacted
 19 about some things, such as follow-up questions about his gym membership application” and “text
 20 message[] invitation[s] to ‘come back’ and reactivate his gym membership.” *Id.* at 1046. The
 21 Ninth Circuit added that “effective consent is one that relates to the same subject matter as is
 22 covered by the challenged calls or text messages.” *Id.* at 1044–45. Crucially, though, “the
 23 transactional context matters in determining the scope of a consumer’s consent to contact.” *Id.* at
 24 1046. The court also cautioned that the plaintiff’s provision of his cell phone number “did not
 25 amount to consent to be contacted for all purposes.” *Id.*

26 As a preliminary matter, Plaintiffs dispute whether the Court can rely on cases analyzing
 27 what constitutes “prior express consent,” which renders a call solicited under the TCPA, to assess
 28 what constitutes “prior express invitation or permission,” which renders a faxed advertisement

solicited under the TCPA. MSJ Opp. at 9–12. But each of Plaintiffs’ arguments on this point fails. First, Plaintiffs contend that “[t]he FCC has explained that the TCPA ‘uses different language in describing facsimile transmissions and telemarketing calls,’ and ‘FCC rules implementing those provisions treat voice calls and faxes differently.’” *Id.* at 10 (quoting FCC Amicus Br., *Palm Beach Golf Ctr.-Boca, Inc. v. Sarris*, No. 13-14013 (11th Cir.), 2014 WL 3734105, at *2–5 (July 17, 2014)). Setting aside that an FCC Amicus Brief is not binding on the Court, the circumstance in which that brief was submitted is irrelevant to the present discussion. That case had nothing to do with, and in no way discussed, “prior express consent” or “prior express invitation or permission.” That case instead concerned who can be liable for telemarketing calls and fax transmissions. And the FCC’s brief concerned distinctions between defined TCPA terms. *Id.* (discussing the terms “initiates,” “seller,” and “telemarketer” versus “sender”). That the TCPA uses different defined language in other instances does not mean that the slightly different language in this instance is material.

The rest of Plaintiffs’ arguments on this point likewise fall short. For instance, Plaintiffs argue that unlike in the fax context, some sort of “implied” consent might suffice in the call context. MSJ Opp. at 11. But the TCPA’s plain language precludes “implied” consent even in the call context, as it states that consent must be “express.” *See* 47 U.S.C. § 227(b)(1)(A). And no case cited by Plaintiffs supports this distinction.² Relatedly, given that no such implied consent

² Two of the four cases Plaintiffs cite only explained that the term “consent” generally may include implied consent, but in no way reached the unfounded conclusion that “express consent” as used in the TCPA could include implied consent. *See Physicians Healthsource, Inc. v. Allscripts Health Sols., Inc.*, No. 12 C 3233, 2017 WL 2391751, at *4 (N.D. Ill. June 2, 2017) (“From the outset, the defendants speak of both consent and permission, using the terms interchangeably. But ‘consent’ isn’t an issue; express permission is. The two are very different. Throughout the law, consent may be express or implied. But in this instance, by definition, ‘permission’ must be ‘expressed.’ There is no avenue for inferring or implying permission or invitation based on circumstances or conduct.”) (internal citations omitted); *Career Counseling, Inc. v. Amsterdam Printing & Litho, Inc.*, No. 3:15-cv-05061-JMC, 2018 WL 3037106, at *4 n.10 (D.S.C. June 19, 2018) (“A party giving prior express invitation or permission is different than a party giving consent.”). The other two cases use “express invitation or permission” and “express consent” interchangeably. *See Physicians Healthsource, Inc. v. A-S Medication Sols. LLC*, 324 F. Supp. 3d 973, 978–79 (N.D. Ill. 2018) (“A-S Medication”) (noting that because “the sender must obtain the prior express invitation or permission from the consumer,” the defendants there could not “avail themselves of the prior express consent defense”); *Gorss Motels, Inc. v. Am. Tex-Chem Corp.*, 323 F. Supp. 3d 330, 335 (D. Conn. 2018) (analyzing the “prior express invitation or permission” requirement as a question of whether the plaintiff “provided prior express consent”).

standard applies in either the call or fax context, Plaintiffs invocation of FCC Rules that would be inconsistent with an implied consent standard is beside the point. *See* MSJ Opp. at 11–12.

ii. Product Registration

Defendants first argue that recipients' voluntary provision of their fax numbers on Medisoft product registration forms constituted "express permission or invitation to receive the faxes at issue" under the Ninth Circuit's reasoning in *Van Patten*. MSJ Mot. at 7–11; MSJ Reply at 14. The Court disagrees.

The Medisoft product at issue "provides templates and forms for health care providers to use to submit insurance claims." *See* MSJ Mot. at 2. When installing Medisoft, users were prompted to register the software by entering their information in the following interface:

Version 12 – Product Registration

Registered User: (new) Medisoft

Register | Hardware | Providers | USPS Address | Order Info | Password

Lylec ID: Serial Number: 4308121413725

Registration Version: 5 Product Version: 12.0.0.0

Product Name: NDC Medisoft Network Professional

Registration Name: TRUE HEALTH CHIROPRACTIC

Contact: Jeffrey R. Shope, D.C.

Street: 2511 W. Schrock Rd

City: Westerville State: OH

Zip Code: 43081 Check Address Address status: Valid

Practice Specialty: Chiropractor

e-mail: truehealth@midohio.twcho.com

Phone: (614)794-1379 Fax: (614)794-1625

Registration Date: 08/16/07

Number of Users: 3

Upgraded from: Upgraded to:

Registration Number: FAC0096465

Save Cancel

Dkt. No. 325-1 ("Cheung Decl.") Ex. D. And Defendants posit that fax recipients' mere entry of their fax numbers in this generic form constituted express permission or invitation to receive a litany of faxed advertisements, because "[a]ll of the at-issue faxes notified (and offered discounts to) customers about version upgrades or identified compatible products or add-ons to improve the

usability of and update the Medisoft product they had previously purchased.” MSJ Mot. at 9–10. Thus, from Defendants’ perspective, the faxed advertisements fall within *Van Patten*’s purportedly “broadly” defined “same subject matter” test. *Id.*

Defendants’ reliance on *Van Patten* proves too much. To start, Defendants focus exclusively on one sentence in *Van Patten* describing “effective consent” as being “one that relates to the same subject matter as is covered by the challenged calls or text messages.” 847 F.3d at 1044–45; MSJ Mot. at 8–12; MSJ Reply at 4, 9, 11, 14. Though relevant, Defendants ignore *Van Patten*’s principal holding from which that statement flowed: that consent in the TCPA context “depends on the transactional context in which it is given.” 847 F.3d at 1040 (emphasis added); *see also id.* at 1045–46 (“Instead, the consent must be considered to relate to the type of transaction that evoked it. . . . This supports that a consumer consents to contact for transaction-related communications when the consumer provides his or her phone number to the caller FCC orders and rulings show that the transactional context matters in determining the scope of a consumer’s consent to contact.”) (emphasis added). And although few cases have parsed the outer bounds of *Van Patten*’s “transactional context” standard, those cases have construed *Van Patten* narrowly.³

Defendants also fail to appreciate that *Van Patten* concerned calls, rather than faxes. As discussed in greater detail above, the TCPA’s protections against bothersome calls and faxes are different in scope. While the TCPA prohibits “any call” meeting certain requirements, it only prohibits faxed “advertisement[s].” *Compare* 47 U.S.C. § 227(b)(1)(A), *with id.* § 227(a)(5), (b)(1)(C). *Van Patten* thus had no occasion to consider whether the contested communications there constituted an “advertisement.” This is not to say that *Van Patten*’s general transaction-context test does not apply in the fax context. But given the TCPA’s distinct protections regarding

³ *See Walintukan v. SBE Entm’t Grp., LLC*, No. 16-cv-01311-JST, 2018 WL 2357763, at *3 (N.D. Cal. May 24, 2018) (construing *Van Patten* narrowly and holding that the provision of a phone number to purchase tickets for one event at a venue was not express consent to receive text messages about other events at the venue); *Trenz v. On-line Adm’rs, Inc.*, No. CV 15-08356-AB (KSx), 2017 WL 6520533, at *2–3 (C.D. Cal. Sept. 25, 2017) (construing *Van Patten* narrowly and holding that the provision of a phone number in connection with having a vehicle serviced was “discrete in nature” and thus was not express consent “to being contacted regarding offers for future servicing of their vehicles”).

1 faxes (as opposed to calls), a court must determine in the fax context whether, in view of “the
2 circumstance in which the consumer gave his or her [fax] number,” the consumer’s provision of
3 the fax number constituted consent to receive not just any contact, but advertisements. 847 F.3d at
4 1040.

5 Turning first to the Medisoft registration form, nothing about the circumstances under
6 which a registrant filled out the form establishes that a reasonable consumer would anticipate
7 receiving advertisements. Consumers purchased a product, installed that product, and registered
8 that product through a generic form that nowhere mentions advertisements, or any sort of contact
9 for that matter. To be sure, entry of one’s fax number in the form constitutes “consent to be
10 contacted” to some extent. *See id.* at 1046. And like in *Van Patten*, no one disputes here that the
11 scope of consumers’ consent to contact includes “some things, such as follow-up questions about
12 [their registration].” *See id.* Nor could anyone reasonably dispute that consumers here consented
13 to receive ordinary fax messages about that topic in the normal course of business. But faxes in
14 the normal course of business are not advertisements. And the Court finds that advertisements do
15 not fit within the scope of consumers’ contextualized consent, in this circumstance.

16 To reach any other conclusion on this point would lead to absurd results not envisioned by
17 the Ninth Circuit in *Van Patten*. For example, accepting Defendants’ proposal—that purchasing
18 one product and entering a fax number in a generic registration form constitutes consent to receive
19 advertisements for any product that might in any way “increase the usability” of the purchased
20 product—would mean the scope of consent is effectively limitless. There would always be a way
21 for defendants to argue that an advertised product “increase[s] the usability” of the purchased
22 product. Even the plaintiff in *Van Patten* who provided his number on a gym membership form
23 could open himself up to advertisements for (1) new workout shoes, (2) at-home, healthy meal-
24 delivery services, (3) sleep-assist devices, or (4) a personal bicycle, all of which might “increase
25 the usability” of the consumer’s gym membership. Nothing in the TCPA or *Van Patten*
26 demonstrates that Congress or the Ninth Circuit ever intended this result.

27 The Court also finds it telling that Defendants, in distinguishing some of Plaintiffs’
28 authorities cited for a different point, argue that “unlike the faxes here, the faxes in *A-S Medication*

1 . . . were clearly unrelated to the original purpose for which the plaintiff provided the fax number.”
 2 MSJ Reply at 8 n.5. But *A-S Medication* involved facts quite analogous to those here. In *A-S*
 3 *Medication*, the defendant argued that customers gave express permission to receive faxes by
 4 entering their fax numbers into a customer relationship management software program called
 5 Salesforce. 324 F. Supp. 3d at 980. The Salesforce software served as an interface between the
 6 customer and company on all aspects of their relationship. *Id.* at 975. And the court there held
 7 that customers’ provision of fax numbers in their Salesforce accounts did not amount to express
 8 permission to receive faxed advertisements. *Id.* at 975.

9 Much like here, the *A-S Medication* defendants stressed that the advertised software was
 10 simply “a newer version of an existing” product and that the fax was targeted to existing
 11 customers “to get them to upgrade” from one software to a newer software. *See* Defendants’
 12 Response in Opposition to Plaintiff’s Motion for Summary Judgment at 6, *Physicians*
 13 *Healthsource, Inc. v. A-S Medication Sols. LLC*, No. 1:12-cv-05105 (N.D. Ill. 2018), ECF No.
 14 282. While the plaintiff did not refute this characterization, the court was unpersuaded by
 15 defendants’ logic:

16 The simple fact of adding a fax number into Salesforce does not show
 17 or even permit a reasonable inference that the customer agreed to
 18 receive faxed ads. The customer may have simply been filling in all
 of the blanks or may have intended only to receive ordinary fax
 messages in the course of business, as opposed to advertisements.

19 *A-S Medication*, 324 F. Supp. 3d at 980; *see also* Plaintiff’s Reply in Support of Motion for
 20 Summary Judgment, *Physicians Healthsource, Inc. v. A-S Medication Sols. LLC*, No. 1:12-cv-
 21 05105 (N.D. Ill. 2018), ECF No. 294 (plaintiff’s reply brief, which did not refute defendants’
 22 characterization of the faxes).

23 McKesson’s claim that the faxes in *A-S Medication*—which targeted existing customers, to
 24 persuade them to upgrade existing software—“were clearly unrelated” to those customers’
 25 provision of fax numbers in other aspects of the consumer-company relationship is equally
 26 applicable to the case at hand. If anything, provision of one’s fax number in a general Salesforce
 27 account ought to constitute broader consent than provision of one’s fax number in registering a
 28 specific product. And it is even more true here that “customer[s] may have simply been filling in

all of the blanks.” *See A-S Medication*, 324 F. Supp. 3d at 980.

iii. EULA

In addition to relying on consumers’ provision of their fax numbers in the Medisoft product registration form as evidence of prior express invitation or permission, Defendants also rely on consumers’ agreement to the Medisoft EULA. Defendants argue that by agreeing to the EULA, consumers “gave permission to McKesson to collect their Medisoft usage information (including information provided at registration), and use it to offer them other features and services.” MSJ Mot. at 1.

The EULA begins with the following disclaimer:

NOTICE: BEFORE PROCEEDING, PLEASE READ THE FOLLOWING LEGAL AGREEMENT WHICH CONTAINS RIGHTS AND RESTRICTIONS ASSOCIATED WITH YOUR USE OF THE MCKESSON SOFTWARE AND ANY DOCUMENTATION PROVIDED TO YOU BY MCKESSON INFORMATION SOLUTIONS, LLC OR ITS AFFILIATES.

Cheung Decl. Ex. A-1 (“EULA”), at RS-TRUEHEALTH000438. It goes on to state:

AS FURTHER DESCRIBED BELOW, USE OF THE SOFTWARE ALSO OPERATES AS YOUR CONSENT TO THE TRANSMISSION, FROM TIME TO TIME, OF CERTAIN COMPUTER AND SOFTWARE USAGE INFORMATION TO MCKESSON.

Id. Later, in the “General Terms” section, the EULA provides:

2.1.2 Software Usage Information. During registration or activation of software, and then on a regular basis, the Software will send information about the Software and Your use of the Software, to McKesson (“Usage Information”). This Usage Information helps prevent the unlicensed or prohibited use of the Software and also *assists McKesson in offering End User other features and services.* Usage Information sent by the Software may include the following: Customer # / serial number; software name; software version; date data was collected; total number of appointments in database; total number of visits in database; total number of transactions in database; for each item in doctor list: number of appointments in last n days, number of visits in last n days, number of charges in last n days; for each clearinghouse in the system: number of claims submitted in last n days, number of eligibility queries submitted in last n days. Usage Information transmitted shall not include any individually identifiable information or any protected health information. End User may opt out of the collection of Usage information by sending notice to McKesson in accordance with Section 2.7 to the attention of the General Manager, Physician Practice Solutions. The notice must

include the Software serial number.

Id. at RS-TRUEHEALTH000442 (italicized emphasis added).

Defendants argue that these provisions collectively informed users “that—unless they opted out—McKesson would utilize information about their software usage to offer them features and services.” MSJ Mot. at 12. Defendants in particular stress that Section 2.1.2 notes that McKesson will collect usage information to “assist McKesson in offering End User other features and services.” *Id.* (quoting EULA at RS-TRUEHEALTH000442).

Defendants’ EULA argument fails for several reasons. To the extent the Court has already held that the transactional context of consumers’ provision of their fax number in the Medisoft product registration form does not constitute express invitation or permission to receive faxed advertisements, nothing about the EULA transforms the overall transactional context in any meaningful way so as to warrant a different result. Reviewing the EULA as a whole, the Court finds that a reasonable user would only understand that assenting to its terms meant consenting to the transmission of usage information *from* the consumer *to* McKesson, not that McKesson would send the user faxed advertisements. The EULA does not once use the words “fax,” “facsimile,” or “advertisement.” Instead, the EULA repeatedly refers to the unidirectional transfer of information to McKesson. *See* EULA at RS-TRUEHEALTH000438 (noting that use of the software operates as consent to the transmission of information of the user “TO MCKESSON”), 442 (providing that “the Software will send information about the Software and Your use of the Software, to McKesson”).

Defendants’ efforts to shoehorn a user’s fax number provided during product registration into the EULA’s definition of “usage information” is also inconsistent with the EULA’s plain language. *See* MSJ Mot. at 1 (contending that usage information “include[es] information provided at registration,” such as the user’s fax number). “Usage information” is a defined term in the EULA. And the EULA lists what constitutes “usage information,” nowhere mentioning fax numbers. *See* EULA at RS-TRUEHEALTH000442 (“Usage Information sent by the Software may include the following: Customer # / serial number; software name; software version; date data was collected; total number of appointments in database; total number of visits in database;

total number of transactions in database; for each item in doctor list: number of appointments in last n days, number of visits in last n days, number of charges in last n days; for each clearinghouse in the system: number of claims submitted in last n days, number of eligibility queries submitted in last n days.”).

Finally, Defendants’ principal authority in support of its EULA argument, *Fober*, is inapposite. The plaintiff there provided her phone number on a general health insurance enrollment form, which included the following broad terms:

THE USE AND DISCLOSURE OF PROTECTED HEALTH INFORMATION: I acknowledge and understand that health care providers may disclose health information about me . . . to Health Net Entities . . . *Health Net Entities . . . may disclose this information for purposes of treatment, payment and health plan operations, including but not limited to, utilization management, quality improvement, disease or case management programs.*

886 F.3d at 791. Plaintiff thereafter attended doctor appointments and received follow-up “quality assurance survey calls.” *Id.* at 792. The Ninth Circuit affirmed summary judgment in defendants’ favor, explaining that the form’s plain terms show that the plaintiff consented to telephone calls “for purposes of . . . quality improvement,” which is “exactly what happened.” *Id.* at 793. And critical to the Ninth Circuit’s finding was that “the text in the Enrollment Form swe[pt] broadly.” *Id.*

There is no such sweeping text in the EULA. And unlike the disclosure in *Fober*, the EULA nowhere reveals that Defendants intended to “use” and “disclose” information for purposes of sending faxed advertisements. A generic (and somewhat cryptic) disclosure that certain information may “assist” McKesson in “offering . . . features and services” simply does not establish the required “prior express invitation or permission” to send faxed advertisements. *See* EULA at RS-TRUEHEALTH000442. No reasonable customer would read that language and understand it to mean that agreeing to the EULA meant he or she would receive faxed advertisements.

At the hearing on the summary judgment motion, Defendants argued that a recent decision from the Eleventh Circuit—*Gorss Motels, Inc. v. Safemark Sys., LP*, Nos. 18-12511, 18-15232, 2019 WL 3384191 (11th Cir. July 26, 2019) (“*Gorss*”)—is factually and legally indistinguishable

from the present case. As an initial matter, an out-of-circuit case obviously is not binding on this Court. More important, *Gorss* if anything illustrates why Defendants' EULA argument fails. There, the plaintiffs "clearly and unmistakably" gave "permission for [Defendant] to send them faxed advertisements" by providing their fax number and agreeing that Defendant "may offer optional assistance to [them] with purchasing items used at or in" plaintiffs' franchise hotels. 2019 WL 3384191, at *4–5. As the Eleventh Circuit explained, "[a] reasonable consumer would understand that assistance with purchasing items entails receiving information about buying products," which is precisely the point of an advertisement. *Id.* at *5. Here, on the other hand, consumers agreeing to the EULA only "clearly and unmistakably" gave permission for Defendant to collect certain "usage information."⁴

C. Summary Judgment Conclusion

The Court finds that Defendants have not carried their burden to show that Plaintiffs gave "prior express invitation or permission" for faxed advertisements either through the provision of their fax numbers in the Medisoft product registration form or by agreeing to the Medisoft EULA.

III. RENEWED MOTION FOR CLASS CERTIFICATION

The Court turns next to Plaintiffs' renewed motion for class certification.

A. Class Certification Legal Standard

Plaintiffs bear the burden of showing by a preponderance of the evidence that class certification is appropriate under Federal Rule of Civil Procedure ("Rule") 23. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350–51 (2011). First, the Plaintiffs must establish that each of the four requirements of Rule 23(a) are met: numerosity, commonality, typicality, and adequacy of representation. *Id.* at 349. Where the plaintiffs "succeed[] in establishing all four of the 23(a) elements, [they] must then satisfy one of the three requirements of Rule 23(b)." *Civil Rights Educ.*

⁴ Although the Eleventh Circuit did not apply *Van Patten*'s transaction-context test, *Gorss*'s transactional context is nothing like the case at hand. In *Gorss*, the relevant permission to receive faxed advertisements fell within a franchise agreement that separately required plaintiffs to "purchase or obtain certain items only from" approved suppliers, such as the defendant. 2019 WL 3384191 at *1. In that context, logic dictates that "assistance with purchasing items" from approved suppliers would require either the franchisor or a supplier to advertise such approved items.

1 & *Enf't Ctr. v. Hosp. Props. Tr.*, 867 F.3d 1093, 1103 (9th Cir. 2017).

2 Rule 23(b)(3) requires a finding “that the questions of law or fact common to class
3 members predominate over any questions affecting only individual members, and that a class
4 action is superior to other available methods for fairly and efficiently adjudicating the
5 controversy.” To determine whether a putative class action satisfies the requirements of Rule
6 23(b)(3), courts consider:

7 (A) the class members’ interests in individually controlling the
8 prosecution or defense of separate actions;

9 (B) the extent and nature of any litigation concerning the controversy
already begun by or against class members;

10 (C) the desirability or undesirability of concentrating the litigation of
11 the claims in the particular forum; and

12 (D) the likely difficulties in managing a class action.

13 Fed. R. Civ. P. 23(b)(3)(A)–(D).

14 While a court’s “class-certification analysis must be rigorous and may entail some overlap
15 with the merits of the plaintiff’s underlying claim, Rule 23 grants courts no license to engage in
16 free-ranging merits inquiries at the certification stage.” *Amgen Inc. v. Conn. Ret. Plans & Tr.*
17 *Funds*, 568 U.S. 455, 465–66 (2013) (internal citations and quotation marks omitted). “Merits
18 questions may be considered to the extent—but only to the extent—that they are relevant to
19 determining whether the Rule 23 prerequisites for class certification are satisfied.” *Id.* at 466
20 (citation omitted). A trial court’s “broad discretion to certify a class . . . must be exercised within
21 the framework of Rule 23.” *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir.
22 2001), *reh’g denied*, 273 F.3d 1266 (9th Cir. 2001) (citation omitted).

23 **B. Discussion**

24 Plaintiffs’ renewed motion seeks to certify the following class:

25 All persons or entities who received faxes from “McKesson” from
26 September 2, 2009, to May 11, 2010, offering “Medisoft,” “Lytec,”
27 “Practice Partner,” or “Revenue Management Advanced” software or
28 “BillFlash Patient Statement Service,” where the faxes do not inform
the recipient of the right to “opt out” of future faxes, and whose fax
numbers are listed in Exhibit A to McKesson’s Supplemental
Response to Interrogatory Regarding Prior Express Invitation or

Permission, but not in Exhibit B or Exhibit C to McKesson's Response to Interrogatory Regarding Prior Express Invitation or Permission.

See Class Mot. at 1.

Defendants contend that certification is inappropriate because neither Rule 23(a) nor Rule 23(b)'s requirements are met. Defendants further assert broad challenges to McLaughlin's ability to advance class claims. This order first addresses the overarching alleged defects before turning to Rule 23(a) and Rule 23(b)'s requirements.

i. Standing

Defendants first argue that McLaughlin lacks standing to pursue claims based on faxes it did not receive. Class Opp. at 18–19. In their view, a TCPA plaintiff “must have received the challenged text or fax to have standing to bring a claim based on that communication.” *Id.* at 19. But Defendants misunderstand the relationship between Article III's standing requirement and class certification. As the Ninth Circuit has explained more than once recently, “once the named plaintiff demonstrates her individual standing to bring a claim, the standing inquiry is concluded, and the court proceeds to consider whether the Rule 23(a) prerequisites for class certification have been met.” *See Kirola v. City & Cty. of S.F.*, 860 F.3d 1164, 1176 (9th Cir. 2017) (quoting *Melendres v. Arpaio*, 784 F.3d 1254, 1262 (9th Cir. 2015)). This means that “any issues regarding the relationship between the class representative and the passive class members—such as dissimilarity in injuries suffered—are relevant only to class certification, not to standing.” *Melendres*, 784 F.3d at 1262 (quoting 1 William B. Rubenstein, *Newberg on Class Actions* § 2:6 (5th ed.) (2018)).

It is undisputed that McLaughlin has standing to advance TCPA claims for faxes received from Defendants. Under Ninth Circuit law, Defendants' objections regarding dissimilarities between McLaughlin and absent class members must thus be resolved under the class certification framework.⁵ *See id.* Accordingly, the Court rejects Defendants' challenge to McLaughlin's

⁵ For this reason, Defendants' following arguments miss the point: (1) “plaintiffs cannot establish standing by bootstrapping their claims to the claims of absent class members”; (2) “a class representative cannot assert class claims based on alleged injuries to absent class members”; and (3) class representatives “must have been personally injured.” Class Opp. at 18–19. McLaughlin

1 standing.

2 **ii. Scope of the Class Claims**

3 Defendants next contend that the Supreme Court’s recent decision in *China Agritech, Inc.*
4 *v. Resh*, 138 S. Ct. 1800 (2018), precludes McLaughlin from serving as a class representative for
5 faxes sent more than four years before McLaughlin intervened in the action. Class Opp. at 16–18.

6 In *China Agritech*, the Supreme Court examined the scope of *American Pipe* tolling, which
7 suspends “the applicable statute of limitations as to all asserted members of the class who would
8 have been parties had the suit been permitted to continue as a class action.” *See Am. Pipe &*
9 *Const. Co. v. Utah*, 414 U.S. 538, 554 (1974). As the *China Agritech* Court explained, *American*
10 *Pipe* and its progeny stand for the principle that where a court denies class action status, members
11 of the failed class may either intervene in the pending action to advance *individual* claims or bring
12 a separate *individual* suit. *China Agritech*, 138 S. Ct. at 1804. Before *China Agritech*, however,
13 Courts of Appeals were split “over whether otherwise-untimely successive class claims may be
14 salvaged by *American Pipe* tolling.” *Id.* at 1805 (underlined emphasis added). And *China*
15 *Agritech* held that *American Pipe* tolling does not permit successive class claims. *Id.* at 1811.
16 But—contrary to Defendants’ suggestion—*China Agritech* said nothing about the question
17 presented here: whether a plaintiff who intervenes before a class certification decision may serve
18 as a class representative for otherwise-untimely class claims based on the time of intervention.

19 The Court need not consider whether *American Pipe* tolling answers this question,
20 however, because binding Ninth Circuit authority provides that the amendment adding
21 McLaughlin as a party plaintiff related back to the original pleading under Rule 15. “An
22 amendment adding a party plaintiff [under Rule 15(c)] relates back to the date of the original
23 pleading only when: (1) the original complaint gave the defendant adequate notice of the claims of
24 the newly proposed plaintiff; (2) the relation back does not unfairly prejudice the defendant; and
25 (3) there is an identity of interests between the original and newly proposed plaintiff.” *In re*
26 *Syntex Corp. Sec. Litig.*, 95 F.3d 922, 935–36 (9th Cir. 1996). “In deciding whether an

27 _____
28 need not bootstrap any claim to have standing because it has its own claims, McLaughlin’s claims
do not rest on injuries to absent class members, and McLaughlin alleges personal injury.

1 amendment relates back to the original claim, notice to the opposing party of the existence and
 2 involvement of the new plaintiff is the critical element.” *Avila v. INS*, 731 F.2d 616, 620 (9th Cir.
 3 1984). Whether the defendant had adequate notice of the newly proposed plaintiff’s claims often
 4 turns on “whether the original complaint clearly stated that the plaintiff sought to represent
 5 others.” *Allen v. Similasan Corp.*, 96 F. Supp. 3d 1063, 1069 (S.D. Cal. 2015) (citations omitted).

6 The Court first finds that the original complaint gave Defendants adequate notice of
 7 McLaughlin’s claims because the original complaint sought to pursue class claims. Although
 8 courts have found that an individual complaint may not provide adequate notice that the plaintiff
 9 seeks claims on behalf of a class, *see, e.g., Corns v. Laborers Int’l Union of N. Am.*, No. 09-cv-
 10 4403 YGR, 2014 WL 1319363, at *5 (N.D. Cal. Mar. 31, 2014), courts uniformly find that a class
 11 action complaint provides defendants adequate notice of other class members’ claims, *see, e.g.,*
 12 *Lith v. Iheartmedia + Entm’t*, No. 1:16-cv-066-LJO-SKO, 2016 WL 4000356, at *6 (E.D. Cal.
 13 July 25, 2016). And here, the original complaint unequivocally sought to bring a class action. *See*
 14 Dkt. No. 1-1 (commencing this action with a “Class Action Complaint”).

15 The Court further finds an identity of interests between the original Plaintiff and
 16 McLaughlin. For there to be the required identity of interests the original Plaintiff and
 17 McLaughlin must be “similarly situated.” *Immigrant Assistance Project of L.A. Cty. Fed’n of*
 18 *Labor (AFL-CIO) v. INS*, 306 F.3d 842, 858 (9th Cir. 2002). Plaintiffs are “similarly situated”
 19 when “[t]he circumstances giving rise to the[ir] claims remain[] the same [under the amended
 20 complaint] as under the original complaint. *Raynor Bros. v. Am. Cyanimid Co.*, 695 F.2d 383, 384
 21 (9th Cir. 1982). Here, the same alleged TCPA violations give rise to the class claims asserted in
 22 both the original and operative complaints. *Compare, e.g.,* Dkt. No. 1-1 at 2 (“This case
 23 challenges Defendants’ practice of sending unsolicited facsimiles.”), *with* SAC at 2 (“This case
 24 challenges Defendants’ practice of sending unsolicited facsimiles.”). And because the Court finds
 25 an identity of interests between the original Plaintiff and McLaughlin, the relation back of
 26 McLaughlin’s claims will not prejudice Defendants. *See Immigrant Assistance*, 305 F.3d at 858
 27 (“The addition of new plaintiffs who are similarly situated to the original plaintiffs therefore did
 28 not cause the INS any prejudice in the present case.”).

Because the Court finds McLaughlin's claims as alleged in the operative complaint relate back to the original complaint, McLaughlin is not precluded from serving as a class representative for faxes sent more than four years before McLaughlin intervened in the action.

iii. Rule 23(a)

a. Numerosity

"[C]ourts have routinely found the numerosity requirement satisfied when the class comprises 40 or more members." *Villalpando v. Exel Direct Inc.*, 303 F.R.D. 588, 605–06 (N.D. Cal. 2014) (citation omitted). Plaintiffs contend—and Defendants do not dispute—that because "there are thousands of class members," the numerosity requirement is "easily met." Class Mot. at 12. The Court agrees and finds that numerosity is satisfied here because joinder of the estimated thousands of class members would be impracticable.

b. Commonality

Rule 23(a)(2) requires that "there are questions of law or fact common to the class." A contention is sufficiently common where "it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Dukes*, 564 U.S. at 350. Commonality exists where "the circumstances of each particular class member vary but retain a common core of factual or legal issues with the rest of the class." *Parra v. Bashas', Inc.*, 536 F.3d 975, 978–79 (9th Cir. 2008). "What matters to class certification . . . is not the raising of common 'questions'—even in droves—but rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Dukes*, 564 U.S. at 350. Even a single common question is sufficient to meet this requirement. *Id.* at 359.

Plaintiffs contend—and Defendants do not dispute—that there are multiple questions of law or fact that are common to the proposed class. Class Mot. at 12–13. The Court agrees and finds that commonality is satisfied.

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c. Typicality

Rule 23(a)(3) requires that “the claims or defenses of the representative parties are typical of the claims or defenses of the class.” “The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct.” *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) (internal quotation marks omitted). Under the “permissive standards” of Rule 23(a)(3), the claims need only be “reasonably co-extensive with those of absent class members,” rather than “substantially identical.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998). In other words, typicality is “satisfied when each class member’s claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant’s liability.” *Rodriguez v. Hayes*, 591 F.3d 1105, 1124 (9th Cir. 2010) (internal quotation marks omitted).

Plaintiffs argue that McLaughlin’s claims are typical of an Exhibit A-only Class because, although McLaughlin did not receive every one of the faxes at issue here, it “received 12 of the 34 fax templates . . . [and] received these faxes as part of the same course of conduct as the rest of the Exhibit A-only Class.” Class Mot. at 13–14. Plaintiffs add that McLaughlin’s “claims are ‘reasonably co-extensive’ with the entire Exhibit A-only Class,” which is all that Rule 23(a)(3) requires. *Id.*

Defendants counter that McLaughlin’s claims are not typical of Exhibit-A only Class members for two reasons: (1) McLaughlin is subject to additional, unique defenses, and (2) McLaughlin’s claims are atypical as to faxes it did not receive. Class Opp. at 13–16. The Court finds neither argument persuasive.

1. Additional Defenses

Defendants argue that McLaughlin’s claims are not typical of Exhibit-A only Class members because McLaughlin is subject to additional defenses. Class Opp. at 13–14. Specifically, Defendants argue that a McLaughlin employee “repeatedly and affirmatively provided McLaughlin’s fax number to McKesson, communicated with McKesson via fax, and discussed the software at issue in the faxes during phone calls with Medisoft representatives.” *Id.*

1 at 14. In other words, Defendants now argue that McLaughlin is not typical of the Exhibit A-only
2 Class because McLaughlin is not an Exhibit A-only Class member, even though Defendants only
3 listed McLaughlin on Exhibit A.

4 If Defendants believed McLaughlin was subject to defenses not applicable to Exhibit A-
5 only Class members, then they should have included McLaughlin on either Exhibit B or Exhibit C.
6 But they did not. And the Court finds unjustifiable Defendants' failure to do so. In fact,
7 Defendants' only evidence of atypical consent cited in opposition to Plaintiffs' renewed motion
8 for class certification is that a McLaughlin employee included a fax number on a "software
9 registration form" and a "Technical Support Agreement." Class Opp. at 12 (citing Cheung Decl.
10 Ex. F, Ex. G at 14). Both of those documents, however, are stamped to reflect that they were
11 introduced at a February 24, 2015 deposition. *See* Dkt. No. 305-1 Ex. F, Ex. G. Defendants were
12 thus fully aware of these documents when they produced the consent-defense Exhibit lists, which
13 were provided to Plaintiffs on June 5, 2015. *See* Dkt. No. 305-1 Ex. A. For whatever reason, at
14 that time, Defendants did not believe that this information warranted including McLaughlin on
15 either the Exhibit B or Exhibit C consent-defense lists. The Court will not permit Defendants to
16 change their mind now, nearly six years into this litigation and after the case has been to the Ninth
17 Circuit and back.

18 2. McLaughlin Did Not Receive All of the Faxes

19 Defendants argue that McLaughlin's claims are atypical of claims based on faxes
20 McLaughlin did not receive because "the evidence demonstrates that the circumstances around
21 each fax campaign varied," as "faxes were sent on a variety of dates and times, regarding different
22 products, and many different people at McKesson decided who would receive the different faxes."
23 *Id.* at 14–15 (citations omitted). McKesson asks too much of the typicality requirement. A class
24 representative's claims need only be "reasonably co-extensive with those of absent class
25 members." *See Hanlon*, 150 F.3d at 1020. They need not be "substantially identical," and they
26 certainly need not be perfectly identical, as Defendants' position suggests. *See id.*; *see also Ellis v.*
27 *Costco Wholesale Corp.*, 657 F.3d 970, 985 n.9 (9th Cir. 2011) ("Differing factual scenarios
28 resulting in a claim of the same nature as other class members does not defeat typicality."); *Bee*,

1 *Denning, Inc. v. Capital All. Grp.*, 310 F.R.D. 614, 626 (S.D. Cal. 2015) (“Plaintiff Bee’s claims
2 are typical of the junk fax class because she alleges that Defendants sent the same or similar
3 unsolicited fax advertisements to putative class members.”). More important, however, the Court
4 sees nothing—and Defendants point to nothing—in these purported variations that is at all
5 relevant to the claims themselves.

6 The Court is aware of one out-of-circuit case that declined to certify a putative TCPA class
7 to include faxes unreceived by the class representative. *See Brodksy v. HumanaDental Ins. Co.*,
8 No. 1:10-cv-03233, 2016 WL 5476233, at *7–8 (N.D. Ill. Sept. 29, 2016). But there, the
9 unreceived faxes were so unlike the faxes received by the class representative that “most of these
10 other faxes were not even the subject of discovery in [the] (long-running) litigation.” *Id.* at *7.
11 That is very unlike the present case, where the faxes related to Exhibit A-only Class members
12 have been well known to both sides for years, and where an appellate court has already ruled that
13 there is little variation within the class’s claims. *See True Health*, 896 F.3d at 932.

14 For these reasons, the Court finds that McLaughlin’s claims are sufficiently typical of
15 claims based on faxes McLaughlin did not receive.

16 d. Adequacy of Representation

17 Rule 23(a)(4) requires that the “representative parties will fairly and adequately represent
18 the interests of the class.” The Court must address two legal questions: (1) whether the named
19 plaintiffs and their counsel have any conflicts of interest with other putative class members, and
20 (2) whether the named plaintiffs and their counsel will prosecute the action vigorously on behalf
21 of the proposed class. *See In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 462 (9th Cir. 2000).
22 This inquiry “tend[s] to merge” with the commonality and typicality criteria. *Gen. Tel. Co. of Sw.*
23 *v. Falcon*, 457 U.S. 147, 158 n.13 (1982). In part, these requirements determine whether “the
24 named plaintiff’s claim and the class claims are so interrelated that the interests of the class
25 members will be fairly and adequately protected in their absence.” *Id.*

26 Defendants do not challenge the adequacy of proposed class counsel. Defendants
27 challenge, however, the adequacy of McLaughlin as a class representative. Class Opp. at 11–13.
28 Defendants in particular argue that McLaughlin is inadequate because it is not a member of the

putative class, given that it consented to receive promotional faxes in ways other than “just via the registration form and EULA.” *Id.* In other words, Defendants’ adequacy challenge is duplicative of their typicality challenge. Because the Court rejects Defendants’ typicality challenge, the Court similarly rejects Defendants’ adequacy challenge.

iv. Rule 23(b)(3)

To certify a class, Plaintiff must also satisfy the two requirements of Rule 23(b)(3). First, “questions of law or fact common to class members [must] predominate over any questions affecting only individual members.” And second, “a class action [must be] superior to other available methods for fairly and efficiently adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3). The Court finds both requirements satisfied in this case.

a. Predominance

“The predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.” *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016) (internal quotation marks omitted). The Supreme Court has defined an individual question as “one where members of a proposed class will need to present evidence that varies from member to member, while a common question is one where the same evidence will suffice for each member to make a prima facie showing [or] the issue is susceptible to generalized, class-wide proof.” *Id.* (citation and internal quotation marks omitted; brackets in original). This “inquiry asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues.” *Id.* (citation and internal quotation marks omitted).

After the Court previously denied class certification, the Ninth Circuit squarely held that an Exhibit A-only Class “would satisfy the predominance requirement of Rule 23(b)(3).” *True Health*, 896 F.3d at 933. Defendants now ask the Court to ignore the Ninth Circuit’s holding, purportedly because individual issues regarding consent defeat predominance, even within the Exhibit A-only Class. Class Opp. at 19–25. According to Defendants, “not just the entities on Exhibit C . . . had individual relationships with their inside sales representatives” and “new evidence” shows that Exhibit A-only Class members gave consent through other means. *Id.* at 22.

Defendants in turn argue that this Court need not follow the Ninth Circuit’s holding because “new evidence refutes the central premise of [that] holding.” *Id.* at 23. Defendants further argue that if the Court were to grant class certification based on the premise that Defendants “can only assert consent defenses based on product registrations and EULAs[, it] would violate the Rules Enabling Act,” as that would limit Defendants’ substantive right to litigate statutory defenses. *Id.* at 23–25.

Plaintiffs respond that Defendants’ predominance challenge is foreclosed by the law-of-the-case doctrine. Class Reply at 8–10. Plaintiffs add that certifying a class based on Defendants’ identification of which class members could be subject to which consent defenses in no way limits Defendants’ substantive rights. *Id.* All Defendants seek at this point—in Plaintiffs’ view—is to “hit the restart button on this litigation.” *Id.*

The Court agrees with Plaintiffs that the law-of-the-case doctrine forecloses Defendants’ predominance challenge. This doctrine precludes a court “from reconsidering an issue previously decided by the same court, or a higher court in the identical case.” *Ingle v. Circuit City*, 408 F.3d 592, 594 (9th Cir. 2005). “The doctrine has developed to ‘maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit.’” *Id.* (citation omitted). Critically, “[t]he issue in question must have been decided explicitly or by necessary implication in the previous disposition.” *Hall v. City of L.A.*, 697 F.3d 1059, 1067 (9th Cir. 2012).

The Court here cannot ignore that the “issue in question”—whether Exhibit A-only Class members satisfy the predominance requirement—was “decided explicitly” by the Ninth Circuit. *See id.*; *True Health*, 896 F.3d at 933 (“We hold that the subclass of putative class members . . . that would be created by taking out of Exhibit A the putative class members listed in Exhibits B and C would satisfy the predominance requirement of Rule 23(b)(3).”). The Ninth Circuit could not have been any clearer in its ruling. And it is not this Court’s prerogative to reconsider the question.⁶

The Court further finds that this conclusion in no way violates the Rules Enabling Act.

⁶ Whether Defendants may at some point bring a motion to decertify the class is not presently before the Court.

Defendants—over four years ago—agreed to produce a supplemental interrogatory “that details the categories of permission . . . [and] identif[ies] the evidentiary categories that would frame discovery.” *See* Dkt. No. 133 at 6. Defendants, however, did not want to identify the recipients that fell into each category of permission, fearing that Plaintiffs might contact persons on the lists “to see if they provided consent,” which Defendants argued was “precisely the type of individual inquiry that defeats class certification.” *Id.* After raising this dispute before Magistrate Judge Ryu, Defendants were ordered to identify the recipients that fell into each category of permission by December 12, 2014. *See* Dkt. No. 143 at 4. Judge Ryu noted that she “ha[d] already ordered Defendants to identify the recipients.” *Id.*

Months later, Judge Ryu sanctioned Defendants, in part, for failing to comply with her instruction. At the sanctions hearing, Defendants repeatedly claimed they were “ready and able to respond fully” on this point, but believed that Plaintiffs should have first served an interrogatory for the information Judge Ryu instructed Defendants to provide. Dkt. No. 175 at 12:8–9 (“[W]e are ready and able to respond fully to an interrogatory once one is served.”), 12:23–24 (“We’ve been waiting and ready and willing.”), 13:19–21 (“[W]e also said we are ready, willing and able to respond to any interrogatory as soon as it’s served.”). Judge Ryu found Defendants’ excuse for “completely ignor[ing]” her prior instruction “unreasonable[.]” and “not credible.” *Id.* 11:1–13:13.⁷ Judge Ryu again ordered Defendants to identify which recipients fell into each category of permission, and unequivocally stated the effect this information would have: “The effect of this interrogatory response should be to identify every putative class member who supposedly gave permission and explain how that recipient gave permission.” Dkt. No. 178 at 12. Defendants later filed a declaration certifying that it produced this information. Dkt. No. 179. Defendants objected neither to Judge Ryu’s imposition of sanctions, nor to Judge Ryu’s instruction to produce the relevant information.

It is unreasonable for Defendants to argue now, after the Ninth Circuit held that Exhibit A-

⁷ Defendants also contended that Judge Ryu’s December order “was not actually an order, but rather a *suggestion*,” which Judge Ryu rightly found “flagrantly unbelievable.” *See* Dkt. No. 178 at 11.

only Class members satisfy the predominance requirement and years after Defendants were instructed to identify which class members fell into each category of permission, that to consider (at the class certification stage) only those consent defenses for Exhibit A-only Class members *as represented by Defendants* abridges their substantive rights in violation of the Rules Enabling Act. This is especially true since Defendants repeatedly claimed *several years ago* that they could easily produce this information.⁸

In keeping with the Ninth Circuit’s holding in this case, the Court finds that Exhibit A-only Class members satisfy the predominance requirement.

b. Superiority

The superiority requirement tests whether “a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3). The Court considers four non-exclusive factors: (1) the interest of each class member in individually controlling the prosecution or defense of separate actions; (2) the extent and nature of any litigation concerning the controversy already commenced by or against the class; (3) the desirability of concentrating the litigation of the claims in the particular forum; and (4) the difficulties likely to be encountered in the management of a class action. *Id.* “Where classwide litigation of common issues will reduce litigation costs and promote greater efficiency, a class action may be superior to other methods of litigation.” *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234–35 (9th Cir. 1996).

Defendants argue that the purported class “is neither a manageable nor superior vehicle” because “the Rules Enabling Act prohibits limitations on McKesson’s ability to assert defenses beyond the registration process and EULAs, and because individual inquiries will predominate as to consent.” Class Opp. at 25. In other words, Defendants argue that Rule 23(b)(3)’s superiority requirement is not met because the predominance requirement is not satisfied. Because the Court rejects Defendants’ predominance challenge, the Court similarly rejects Defendants’ superiority challenge. This Court instead finds that “classwide litigation of common issues will reduce

⁸ All of this history illustrates the ways Defendants’ persistent factual and legal shape-shifting has needlessly complicated this case before, during, and after the appeal.

litigation costs and promote greater efficiency.” *See Valentino*. 37 F.3d at 1234–35.

C. Renewed Class Certification Conclusion

For the foregoing reasons, the Court **GRANTS** Plaintiffs’ renewed motion for class certification and certifies the following class:

All persons or entities who received faxes from “McKesson” from September 2, 2009, to May 11, 2010, offering “Medisoft,” “Lytec,” “Practice Partner,” or “Revenue Management Advanced” software or “BillFlash Patient Statement Service,” where the faxes do not inform the recipient of the right to “opt out” of future faxes, and whose fax numbers are listed in Exhibit A to McKesson’s Supplemental Response to Interrogatory Regarding Prior Express Invitation or Permission, but not in Exhibit B or Exhibit C to McKesson’s Response to Interrogatory Regarding Prior Express Invitation or Permission.


The Court appoints McLaughlin Chiropractic Associates, Inc. to represent the class, and appoints as class counsel its attorneys at Anderson + Wanca, Montgomery, Rennie & Jonson, and Schubert Jonckheer & Kolbe LLP.

IV. CONCLUSION

The Court **DENIES** Defendants’ motion for summary judgment and **GRANTS** Plaintiffs’ renewed motion for class certification. The parties are **DIRECTED** to meet and confer and e-file by August 23, 2019 a stipulation and proposed order setting forth a schedule through trial.

IT IS SO ORDERED.

Dated: 8/13/2019


HAYWOOD S. GILLIAM, JR.
United States District Judge